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15 Situated and Aggrieved Employees

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 JERICHO NICOLAS an individual, et al.,
19 On Behalf of Themselves and All Others
20 Similarly Situated and Aggrieved;

21 Plaintiffs,

22 v.

23 UBER TECHNOLOGIES, INC, a
24 Delaware Corporation; and DOES 1
25 through 10,

26 Defendants.

CASE NO.: 4:19-cv-08228-PJH

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S
MOTION TO COMPEL ARBITRATION**

Hearing Date: May 27, 2020
Hearing Time: 9:00 am
Hearing Place: Courtroom 3
Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

Plaintiffs hereby respond to Defendant's Motion to Compel Arbitration ("Motion") and respectfully request the Court to deny the Motion because;

- (1) all named Plaintiffs have properly opted out of the arbitration provisions of Defendant's 2019 Technology Service Agreement;
- (2) defendant's 2019 Technology Service Agreement terminates all prior agreements; and
- (3) the arbitration provisions are procedurally and substantively unconscionable and, therefore, unenforceable.

This is a wage and hour class action pursuant to California Code of Civil Procedure § 382, on behalf of Plaintiffs and all individuals working or having worked as "ride-share drivers" ("Class Members") for Defendant UBER TECHNOLOGIES, INC., (hereinafter "UBER") within the State of California. Plaintiffs are informed and believe and, based thereon allege, that the Class Members consist of approximately 50,000-75,000 current and former UBER employees who worked as UBER "ride-share drivers." Plaintiffs, on behalf of themselves and all Class Members, file this Motion in Opposition to Defendant's Motion to Compel Arbitration.

II. BACKGROUND

To begin using the UBER App and connect with riders, a driver must enter into a license agreement called the Technology Services Agreement. *See* Mtn. to Compel Arbitration ("Mtn."), 2:3-4. The original Agreement (hereinafter "2015 Agreement"), which included an arbitration provision that applied to Plaintiffs, was in effect on or about December 11, 2015 through November 24, 2019. *See* Mtn. 2:4-5. On or about November 25, 2019, UBER updated its terms of use in an amended Technology Services Agreement (hereinafter "2019 Agreement"). *See* Declaration of Brad Rosenthal in Support of Defendant Uber Technologies, Inc's Motion to Compel Arbitration, ("Decl. Rosenthal"), 4:17-24.

Plaintiffs' in this action were presented with the 2019 Agreement, which included an arbitration provision. *See* Mtn. 5:6-11. Relying on the arbitration provision in the 2019 Agreement, Plaintiffs acted to opt out of arbitration. *See* Declaration of Ronald Zambrano in

1 Support of Opposition to Motion to Compel Arbitration, (“Decl. Zambrano), Exhibits A-AC,
2 which are true and correct copies of Plaintiffs’ emails to optout@uber.com. Despite this action,
3 UBER argues Plaintiffs are bound by arbitration.

4 **A. UBER Acknowledged the Opt Out Emails**

5 Defendant’s motion to compel arbitration is meritless because each plaintiff opted out of
6 the arbitration provisions of the 2019 Agreement. First, UBER does not assert Plaintiffs **Kevin**
7 **Neely, Alexis Gonzalez, and Mark Glinoga** failed to opt out of the arbitration agreement. *See*
8 *Mtn. 2:21-22, 4:11-13*. Ergo, the dispute for these three Plaintiffs is not subject to arbitration.

9 As for the rest of the named Plaintiffs, all opted out of the arbitration agreement, as set
10 forth here: On or about November 30, 2019 and January 14, 2020, Plaintiff **Laura Alvarado**
11 **Hernandez** opted-out of arbitration via e-mail and included her phone number, her city of
12 residence and her intention to opt-out of arbitration. *See Decl. Zambrano, Exhibit A*. On or about
13 November 30, 2019, **Laura Alvarado Hernandez**, received confirmation of her opt-out e-mail
14 upon submission. *Id.*

15 On or about December 13, 2019, Plaintiff **Carlos Alvarez** opted out of arbitration via e-
16 mail by stating his intention to opt-out of arbitration and included his phone number. *See Decl.*
17 *Rosenthal 8:5-7*.

18 On or about December 14, 2019 Plaintiff **Karen Y. Alvarez** opted out of arbitration via
19 e-mail by stating her intention to opt-out of arbitration and included her phone number and
20 received confirmation of her opt-out e-mail upon submission. *See Decl. Zambrano, Exhibit B*.

21 On or about December 8, 2019 Plaintiff **Rick Anderson** opted out of arbitration via e-
22 mail by stating his intention to opt-out of arbitration and included his phone number and city of
23 residence and received confirmation of his opt-out e-mail upon submission. *See Decl. Zambrano,*
24 *Exhibit C*.

25 On or about November 29, 2019 Plaintiff **Sherif Bebawy** opted out of arbitration via e-
26 mail by stating his intention to opt-out of arbitration and included his phone number and city of
27 residence and received confirmation of his opt-out e-mail upon submission. *See Decl. Zambrano,*
28 *Exhibit D*.

1 On or about December 16, 2019 Plaintiff **Kevin Byler** opted out of arbitration via e-mail
2 by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
3 Rosenthal 7:21-23.

4 On or about November 27, 2019 Plaintiff **Eric Calvillo-Hernandez** opted out of
5 arbitration via e-mail by stating his intention to opt-out of arbitration and included his phone
6 number and city of residence. *See* Decl. Rosenthal 8:5-7.

7 On or about December 23, 2019 Plaintiff **Christopher Campana** opted out of arbitration
8 via e-mail by stating his intention to opt-out of arbitration and included his phone number and
9 received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit E.

10 On or about December 13, 2019 Plaintiff **Gustavo Candelo** opted out of arbitration via e-
11 mail by stating his intention to opt-out of arbitration and included his phone number and received
12 confirmation of his opt-out e-mail upon submission. On or about January 23, 2019, Plaintiff
13 Gustavo Candelo sent a supplemental e-mail to opt-out of arbitration which included his city of
14 residence and received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano,
15 Exhibit F.

16 On or about December 18, 2019 Plaintiff **Jason Casas** opted out of arbitration via e-mail
17 by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
18 Rosenthal 8:23-25.

19 On or about December 21, 2019 Plaintiff **Bryant Castaneda** opted out of arbitration via
20 e-mail by stating his intention to opt-out of arbitration and included his phone number. On or
21 about January 16, 2019, Plaintiff Bryant Castaneda sent a supplemental e-mail to opt-out of
22 arbitration which included his city of residence. *See* Decl. Rosenthal 9:4-5.

23 On or about December 24, 2019, Plaintiff **Juan Castro** opted out of arbitration via e-mail
24 by stating his intention to opt-out of arbitration and included his phone number and city of
25 residence and received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano,
26 Exhibit G.

27 On or about December 13, 2019 Plaintiff **Kelly Clifton** opted out of arbitration via e-mail
28 by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.

1 Rosenthal 9:17-19.

2 On or about December 17, 2019 Plaintiff **Jose Contreras** opted out of arbitration via e-
3 mail by stating his intention to opt-out of arbitration and included his phone number and received
4 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit H.

5 On or about December 13, 2019 Plaintiff **Jaime Del Real** opted out of arbitration via e-
6 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
7 Rosenthal 10:4-5.

8 On or about December 16, 2019 Plaintiff **Shamar Drew** opted out of arbitration via e-
9 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
10 Rosenthal 10:9-11.

11 On or about November 29, 2019 Plaintiff **Claudia Duque** opted out of arbitration via e-
12 mail by stating her intention to opt-out of arbitration and included her phone number and city of
13 residence and received confirmation of her opt-out e-mail upon submission. *See* Decl. Zambrano,
14 Exhibit I.

15 On or about December 10, 2019 Plaintiff **Christine Economos** opted out of arbitration
16 via e-mail by stating her intention to opt-out of arbitration and included her phone number and
17 city of residence. *See* Decl. Rosenthal 10:22-23.

18 On or about December 17, 2019 Plaintiff **Royal Gaston** opted out of arbitration via e-mail
19 by stating his intention to opt-out of arbitration and included his phone number and received
20 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit J.

21 On or about November 29, 2019 Plaintiff **Majd Iskandafi** opted out of arbitration via e-
22 mail by stating his intention to opt-out of arbitration and included his phone number and city of
23 residence and received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano,
24 Exhibit K.

25 On or about December 16, 2019 Plaintiff **Jorge Jimenez** opted out of arbitration via e-
26 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
27 Rosenthal 12:2-3.

28 On or about December 15, 2019 Plaintiff **Timothy Kershaw** opted out of arbitration via

1 e-mail by stating his intention to opt-out of arbitration and included his phone number and
2 received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit L.

3 On or about December 13, 2019 Plaintiff **Benjamin Laney** opted out of arbitration via e-
4 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
5 Rosenthal 12:14-15.

6 On or about December 16, 2019 Plaintiff **Yhon Lara** opted out of arbitration via e-mail
7 by stating his intention to opt-out of arbitration and included his phone number and received
8 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit M. On or
9 about December 31, 2019, Plaintiff Yhon Lara sent a supplemental e-mail to opt-out of arbitration
10 which included his city of residence. *Id.*

11 On or about December 15, 2019 Plaintiff **Barton Lasheem** opted out of arbitration via e-
12 mail by stating his intention to opt-out of arbitration and included his phone number and received
13 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit N.

14 On or about December 18, 2019 Plaintiff **Wayne Merritt** opted out of arbitration via e-
15 mail by stating his intention to opt-out of arbitration and included his phone number and city of
16 residence. *See* Decl. Rosenthal 13:6-7.

17 On or about December 13, 2019 Plaintiff **Juan Montalvo** opted out of arbitration via e-
18 mail by stating his intention to opt-out of arbitration and included his phone number and received
19 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit O.

20 On or about December 21, 2019 Plaintiff **Syed Naqvi** opted out of arbitration via e-mail
21 by stating his intention to opt-out of arbitration and included his phone number and received
22 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit P.

23 On or about December 15, 2019 Plaintiff **Jericho Nicolas** opted out of arbitration via e-
24 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
25 Rosenthal 14:7-9.

26 On or about December 13, 2019 Plaintiff **Williams Ramirez** opted out of arbitration via
27 e-mail by stating his intention to opt-out of arbitration and included his phone number and
28 received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit Q.

1 On or about December 18, 2019 Plaintiff **James Sparks** opted out of arbitration via e-
2 mail by stating his intention to opt-out of arbitration and included his phone number. *See* Decl.
3 Rosenthal 14:21-23. On or about January 13, 2020, Plaintiff James Sparks sent a supplemental
4 e-mail to opt-out of arbitration which included his city of residence and received confirmation of
5 his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit R.

6 On or about December 14, 2019 Plaintiff **Kamal Suri** opted out of arbitration via e-mail
7 by stating his intention to opt-out of arbitration and included his phone number. On or about
8 February 5, 2020, Plaintiff Kamal Suri sent a supplemental e-mail to opt-out of arbitration which
9 included his city of residence. *See* Decl. Rosenthal 15:2-3.

10 On or about December 17, 2019 Plaintiff **Carlos Torres** opted out of arbitration via e-
11 mail by stating his intention to opt-out of arbitration and included his phone number and city of
12 residence and received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano,
13 Exhibit S.

14 On or about November 29, 2019 Plaintiff **Zuleyma Torres** opted out of arbitration via e-
15 mail by stating her intention to opt-out of arbitration and included her phone number and city of
16 residence and received confirmation of her opt-out e-mail upon submission. *See* Decl. Zambrano,
17 Exhibit T.

18 On or about December 13, 2019 Plaintiff **Christine Tringali** opted out of arbitration via
19 e-mail by stating her intention to opt-out of arbitration and included her phone number and city
20 of residence. *See* Decl. Rosenthal 15:20-21.

21 On or about December 16, 2019 Plaintiff **Richard Trujilo** opted out of arbitration via e-
22 mail by stating his intention to opt-out of arbitration and included his phone number and received
23 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit U.

24 On or about December 13, 2019 Plaintiff **Dora Waters** opted out of arbitration via e-mail
25 by stating her intention to opt-out of arbitration and included her phone number. *See* Decl.
26 Rosenthal 16:24-25.

27 On or about November 29, 2019 Plaintiff **Alexi Vinnik** opted out of arbitration via e-mail
28 by stating his intention to opt-out of arbitration and included his phone number and city of

1 residence and received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano,
2 Exhibit V.

3 On or about November 29, 2019 Plaintiff **Rolando Vega** opted out of arbitration via e-
4 mail by stating his intention to opt-out of arbitration and included his phone number and city of
5 residence. *See* Decl. Rosenthal 16:12-13.

6 On or about December 13, 2019 Plaintiff **Sevak Vartanpour** opted out of arbitration via
7 e-mail by stating his intention to opt-out of arbitration and included his phone number and
8 received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit W.

9 On or about December 13, 2019 Plaintiff **Steven Robert Callahan** opted out of arbitration
10 via e-mail by stating his intention to opt-out of arbitration and included his phone number. *See*
11 Decl. Zambrano, Exhibit AB.

12 On or about December 13, 2019 Plaintiff **Juan Jamarron** opted out of arbitration via e-
13 mail by stating his intention to opt-out of arbitration and received confirmation of his opt-out e-
14 mail upon submission. *See* Decl. Zambrano, Exhibit X.

15 On or about December 13, 2019 Plaintiff **Marcos Montes** opted out of arbitration via e-
16 mail by stating his intention to opt-out of arbitration and included his phone number and received
17 confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit Y.

18 On or about January 16, 2020 Plaintiff **Lisette Castillo** opted out of arbitration via e-mail
19 by stating her intention to opt-out of arbitration and included her phone number and city of
20 residence. *See* Decl. Zambrano, Exhibit AC.

21 On or about December 13, 2019 Plaintiff **Gary Baumgarten** opted out of arbitration via
22 e-mail by stating his intention to opt-out of arbitration and included his phone number and
23 received confirmation of his opt-out e-mail upon submission. *See* Decl. Zambrano, Exhibit Z.

24 As UBER acknowledged the opt out of the Plaintiffs, the present action are not subject to
25 the arbitration agreement and, therefore, cannot be compelled to arbitrate their claims. For these
26 reasons, the Court should deny UBER to compel arbitration.

27 //

28 //

III. LEGAL STANDARD ON A MOTION TO COMPEL ARBITRATION

The party attempting to enforce an arbitration agreement bears the burden of proving that a valid arbitration agreement exists and covers the claims at issue. *See Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 971 (1997). It is undisputed here that the Court has jurisdiction to determine arbitrability of the dispute, not an arbitrator. *See Ajamian v. CantorC02e, L.P.*, 203 Cal. App. 4th 771, 782 (2012). Under both the Federal Arbitration Act and the California Arbitration Act, state law contract principles apply to determine whether the parties formed a valid arbitration agreement. *See* 9 U.S.C. § 2; Cal. Civ. Pro. § 1281; see also *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 926-27 (2013); *Romo v. Y-3 Holdings, Inc.*, 87 Cal. App. 4th 1153, 1158–59 (2000); *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416, 420 (2000). Here, UBER has not met its burden to prove the Plaintiffs are bound by a valid agreement to arbitrate. Specifically, UBER failed to establish that the Plaintiffs consented to and are bound to arbitrate.

IV. ARGUMENT

The Court should deny Defendant's Motion because: (1) Plaintiffs properly opt-ed out of the relevant arbitration provision; (2) UBER's Agreement terminates the 2015 Agreement; and (3) UBER's arbitration provisions are procedurally and substantively unconscionable and, therefore, unenforceable.

A. Plaintiffs Opted Out in Fact and By Operation of Law

Traditional state contract law applies to the validity and enforceability of UBER's alleged arbitration agreement. *See* 9 U.S.C. § 2; Cal. Civ. Pro. § 1281. "The interpretation of the purported acceptance or rejection of an offer is a question of fact . . . [T]he test of the true meaning of an acceptance . . . is what a reasonable person in the position of the parties would have thought it meant." *Guzman v. Visalia Community Bank*, 71 Cal. App. 4th. (1999). "Acceptance of an offer, which may be manifested by conduct as well as by words, must be expressed or communicated by the offeree to the offeror." *Russell v. Union Oil Co.* 7 Cal. App. 3d 110, 114. (1970).

Here, under the 2019 Agreement, UBER made an *offer* to its ride-share drivers to opt-out of the arbitration of claims within 30 days of accepting new terms and conditions for being UBER

1 drivers. *See* Mtn. 5:19-22. The specific instruction to do so was by way of an electronic message
2 from the email address associated with their UBER account to optout@uber.com, stating their
3 intent to opt out of this arbitration provision, as well as providing their name, the phone number
4 associated with their account, and the city they live in. *See id.* So, in contractual terms, UBER
5 offered each ride-share driver (like Plaintiffs herein) the option to opt-out of the arbitration
6 provision. The manner of acceptance of this opt-out offer was performance of two reasonable
7 steps: (1) an email communicating the intent to opt-out; and (2) the opt-out email communication
8 be sent within 30 days. Therefore, where a driver emailed their intent to opt out within 30 days,
9 UBER and the driver agreed that the arbitration provision was no longer a term or condition of
10 their working relationship. There could be no more reasonable interpretation of this contract from
11 the position of the parties.

12 As set forth substantively above, each Plaintiff sent UBER an email expressing their desire
13 to opt-out within 30 days of accepting the new terms and conditions. *See* Exhs. “A-AC”, Decl.
14 Zambrano. Plaintiffs’ performance legally constituted acceptance of UBER’s offer, forming a
15 legally enforceable contract where both UBER and Plaintiffs are no longer subject to the
16 arbitration provision. *See Union Oil Co.* 7 Cal. App. 3d 110, 114.

17 Exalting form over substance, UBER ostensibly argues Plaintiffs did not complete
18 performance, and thus the offer was not accepted, merely because of the omission of a phone
19 number and/or a city of residence in the opt-out emails. *See* Mtn. 5:25-28. UBER cites no
20 authority for this underlying legal premise. Plaintiffs posit their timely emails communicating
21 their intent to opt-out is full performance of terms because “the words of a contract are to be
22 understood in their ordinary and popular sense.” Cal. Civ. Code § 1644. The ordinary sense of
23 UBER’s invitation for drivers to email their intent to opt-out reasonably requires a timely email
24 expressing same. The manner of performance beyond this should not be pedantically
25 overcomplicated as a matter of law. Substantial performance means that there has been no willful
26 departure from the terms of the contract, and no omission of any of its essential parts, and that the
27 contractor has in good faith performed all of its substantive terms. If so, he will not be held to
28 have forfeited his right to a recovery by reason of trivial defects or imperfections in the work

performed. *Connell v. Higgins* 170 Cal. 541, 556 (1915). Thus, Plaintiffs timely opt-out emails substantially perform the intent of the parties. i.e., opt out in a timely way.

Does the lack of a phone number or city of residence prevent UBER from understanding a drivers' timely communication expressing their desire to opt out of the arbitration provision? Is UBER so befuddled by these omissions that it cannot grasp the meaning of these emails? This hyperbolic exercise illustrates the absurdity of UBER's position that a missing city or phone number waters down the legal consequence of Plaintiffs' timely opt-out emails.

Moreover, UBER acknowledged by email the receipt of Plaintiffs' opt-out communications. *See* Decl. Zambrano at Exhs. "A" – "AC." This conduct demonstrates UBER's contemporaneous satisfaction of performance by the Plaintiffs.

B. Uber's 2019 Agreement Terminates the 2015 Agreement

In deciding whether to enforce an arbitration agreement, the court must determine "(1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute." *Cox v. Ocean View Hotel Corp.* 533 F. 3d 1114, 1119, (2008); see also 9 U.S.C. § 2; *Urbino v. Orkin Services of California, Inc.* 882 F. Supp. 2d 1152 (2011). Determining the validity of an arbitration agreement is a question of contract interpretation and thus governed by state law. *Circuit City Stores, Inc. v. Adams*, 20020 279 F.3d 889, 892 (2002); see also *First Options of Chicago, Inc., v. Kaplan* 514 U.S. 938, 944 (1995). While the Federal Arbitration Act, 9 U.S.C. § 1, et seq. ("FAA") maintains a policy that favors the enforcement of arbitration agreements, *AT&T Mobility LLC v. Concepcion* 131 S. Ct. 1740, 1746 (2011); see also *Circuit City Stores* 279 F. 3d at 889, 892 (2002), that policy does not apply to a court's preliminary determination whether any agreement to arbitrate exists. *Perry v. Thomas* 482 U.S. 483, 492 (1987). "A contract is an agreement to do or not to do a certain thing" Cal. Civ. Code § 1549, and contract elements include parties capable of contracting, their mutual consent, a lawful object, and sufficient consideration. *Id.* at §§ 1550, 1565.

Here, the 2019 Agreement states:

13.5 Entire Agreement. Except as provided below, this Agreement, including all Supplemental Terms, constitutes the entire agreement and understanding of the parties with respect to its subject matter and replaces and supersedes all

1 prior or contemporaneous agreements or undertakings regarding such subject
2 matter.... Notwithstanding the foregoing, if you opt out of the arbitration
3 provision set forth in Section 15.2 below, then any prior arbitration agreement
between the parties shall remain in full forces and effect.

4 **14. Existing Agreements.** This Section 14 only applies if you were party to a
5 2015 Agreement effective immediately prior to the Effective Time: 14.1 2015
6 Agreement. Except as provided in Section 15 below, you and the applicable
7 Uber Subsidiary hereby terminate such 2015 Agreement (except as provided
in Section 12.3 of the 2015 Agreement), effective as of the Effective Time.
“Effective Time” means the date and time on which the Agreement is
accepted by you.

8 Section 13.5 of the 2019 Agreement states that even if Plaintiffs opt-out of the 2019
9 arbitration provision, Plaintiffs are still subject to any existing Arbitration Provision, i.e. the 2015
10 Agreement. At the same time, sections 13.5 and 14 of the 2019 Agreement provide that the 2019
11 Agreement “replaces,” “supersedes,” and specifically terminates the 2015 Agreement. In other
12 words, UBER cannot use the 2015 Agreement to bind Plaintiffs to arbitration because the 2019
13 Agreement terminated the 2015 Agreement. The termination of the 2015 Agreement became
14 effective when Plaintiffs accepted the 2019 Agreement. Subsequently, all Plaintiffs opted out of
15 arbitration because they acted in reliance on the arbitration provision in the 2019 Agreement.
16 Plaintiffs did not show mutual consent to be bound to arbitration of their disputes with UBER. In
17 fact, Plaintiffs showed lack of consent to arbitrate when they took steps to opt out. Therefore,
18 UBER has failed to show a valid agreement to arbitrate between Plaintiffs and itself exists.

19 Moreover, UBER fails to present evidence of any Plaintiffs’ agreement to the 2015
20 agreement. A contract’s terms must be consented to after they are communicated. *See* Cal. Civ.
21 Pro § 1565. There is no evidence that drivers starting after 2015 consented to a 2015 agreement.
22 There is no evidence that any of the named Plaintiffs’ agreed to the 2015 agreement. Based
23 thereon, Plaintiffs respectfully ask the Court find the 2015 arbitration agreement does not apply
24 to the present dispute.

25 **C. Uber’s arbitration provisions are procedurally and substantively**
26 **unconscionable**

27 Under California law, “unconscionability has both a “procedural” and a “substantive”
28

1 element,’ the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the
2 latter on ‘overly harsh’ or ‘one-sided’ results.” *Armendariz v. Found. Health Psychcare Servs.,*
3 *Inc.* 24 Cal. 4th 83 (2000) quoting *A & M Produce Co. v. FMC Corp.* 135 Cal. App. 3d 473
4 (1982). Both substantive and procedural unconscionability must be present for a court to find a
5 contract unconscionable, but “they need not be present in the same degree.” *Id.* Recently, the
6 California Supreme Court has emphasized that “unconscionability requires a substantial degree
7 of unfairness *beyond ‘a simple old-fashioned bad bargain.’*” *Baltazar v. Forever 21, Inc.* 62 Cal.
8 4th 1237 (2013) quoting *Sonic–Calabasas A, Inc. v. Moreno* 57 Cal. 4th 1109, 163 Cal. Rptr. 3d
9 269, 311 P.3d 184, 202 (2013). Rather, unconscionable contracts are those that are “so one-sided
10 as to ‘shock the conscience.’” *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC*
11 55 Cal. 4th 223 (2012).

12 In this case, UBER gave its ride-share drivers no meaningful opportunity to opt-out of
13 arbitration. Under the 2019 Agreement, UBER terminated the 2015 Agreement, but at the same
14 time bound Plaintiffs to the 2015 Agreement. UBER has not explained the function of Plaintiffs’
15 opt out of the 2019 Agreement. In reading UBER’s motion, Plaintiffs are left with no
16 understanding of what, if anything, they opted out of when they acted in reliance on the 2019
17 Agreement’s arbitration provision and messaged their intent to opt out of arbitration. As it stands,
18 UBER has failed to provide Plaintiffs an opportunity to opt out of arbitration and, therefore, are
19 attempting to bind Plaintiffs to an adhesive provision. As discussed *supra*, UBER’s arbitration
20 provision is unconscionable because it is adhesive.

21 **1. Procedural Unconscionability**

22 An agreement is procedurally unconscionable if there is gross inequality of bargaining power
23 between the parties. The procedural aspect of the unconscionability analysis focuses on the
24 manner in which the agreement was negotiated and, typically, on “the oppressiveness of the
25 stronger party's conduct.” *Kinney v. United Healthcare Service, Inc.* 70 Cal. App. 4th at 1329
26 (1999); *Mercuro v. Superior Court* 96 Cal. App. 4th 167, 174 (2002). “Oppression arises from
27 an inequality of bargaining power which results in no real negotiation and ‘an absence of
28 meaningful choice.” *A&M Produce Co. v. FMC Corp.* 135 Cal. App. 3d 473, 486 (1982).

Section 13.5 of the 2019 Agreement states that even if Plaintiffs opt-out of the 2019 arbitration provision, Plaintiffs are still subject to any existing Arbitration Provision, i.e. the 2015 Agreement. The 2015 Agreement also states that even if this agreement is modified, it does not create a renewed opportunity to opt out of arbitration. The reasonable inference is that this clause in the 2015 and 2019 Agreements bound Plaintiffs to arbitration, no matter how many times UBER changed its terms and conditions. UBER made sure it remained in control of how disputes would be resolved between ride-share drivers and itself. The 2015 and 2019 Agreements' arbitration provisions were non-negotiable as it applied to Plaintiffs. No real negotiation took place or could have possibly taken place in regard to being subjected to arbitration even if UBER changed its terms. As such, the agreement was procedurally unconscionable because of the gross inequality of bargaining power between UBER and its ride-share drivers.

2. Substantive Unconscionability

“Substantive unconscionability focuses on ‘the actual terms of the agreement and evaluates whether they create such ‘overly harsh’ or ‘one-sided’ results as to ‘shock the conscience’.” *Suh v. Superior Court* 181 Cal.App.4th 1504, 1515 (2010).

The arbitration provision found in the 2015 and 2019 Agreement is particularly harsh towards ride-share drivers in that, even if Plaintiffs were well-versed in legal and contractual terminology, they would not understand the terms they are bound by. Within the four corners of the 2019 Agreement, Plaintiffs interpreted the plain meaning of the terms to replace and supersede any prior agreement. A lay person's reasonable interpretation of the 2019 Agreement, especially in the context of a ride-share driver attempting to use an application to connect with potential riders, could not be expected to be more than understanding the plain meaning of a contract's terms. The argument that ride-share drivers consented to arbitrate their claims based on complicated contractual tricks of referring to previous agreements while simultaneously terminating those same agreements is the epitome of one-sided. To be bound to UBER's preferred terms, regardless of agreement amendments and actions clearly communicating intent not to be bound, is substantially unconscionable.

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Accordingly, Plaintiffs respectfully ask the Court to find the provision binding drivers in 2019 to a 2015 arbitration agreement as procedurally and substantively unconscionable, and thus unenforceable against the Plaintiffs.

V. CONCLUSION

In sum, all Plaintiffs properly opted out of the 2019 arbitration provision, and cannot be subject to a 2015 arbitration provision. As such, Plaintiffs respectfully ask the Court to deny UBER's motion to compel arbitration.

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